



**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. 1284/2021

In the matter between:

**TEKOA CONSULTING ENGINEERS (PTY LTD**

**Applicant**

**and**

**ALFRED NZO DISTRICT MUNICIPALITY**

**First Respondent**

**THE MUNICIPAL MANAGER:**

**ALFRED NZO DISTRICT MUNICIPALITY**

**Second Respondent**

**ZINZAME CONSULTING ENGINEERS / CYCLE  
PROJECTS / UBUNTU BAM JV**

**Third Respondent**

**EMLANJENI JV**

**Fourth Respondent**

**OLON CONSULTING ENGINEERS JV**

**IPM PLANT HIRE**

**Fifth Respondent**

**BM INFRASTRUCTURE JV MAGNACORP**

**Sixth Respondent**

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**JUDGMENT**

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**LAING J**

[1] This is a review application that concerns the award of a tender for the appointment of a panel of service providers for the planning, design and construction of Water Services Infrastructure Grant ('WSIG') funded projects for the Alfred Nzo District Municipality, situated in the north-eastern corner of the Eastern Cape Province. The applicant seeks an order that, *inter alia*, reviews and sets aside the decision to refuse to appoint it to the panel. It seeks alternative relief to the effect that the decision to appoint the third to sixth respondents be reviewed and set aside and that the decision be referred back to the Bid Evaluation Committee ('BEC') and the Bid Adjudication Committee ('BAC') for reconsideration.

[2] The applicant has brought the application in terms of section 6 of the Promotion of Administrative Justice Act 5 of 2000 ('PAJA'), read with rule 53 of the Uniform Rules of Court.

## **Background**

[3] The Municipality previously advertised a request for proposals ('RFP') for appointment to 'the panel of consortium service providers (professional and consulting entity and contractor) for the planning, design and construction of WSIG funded projects in the Alfred Nzo District Municipality for a period of three (3) years [sic].'<sup>1</sup> The closing date for submissions was 23 June 2020. The purpose of the tender was to give effect to the implementation of an intervention programme by water services authorities ('WSAs') 'to address water services backlogs as well as to provide interim relief for hot spot areas within the WSA's area of jurisdiction.' The services required by the successful bidders included: the preparation of technical reports, business plans, and designs; the construction and supervision of projects; and the preparation of close-out and compliance reports.

[4] The tender documents indicated that the 90/10 preference point system would apply, with a maximum of 90 points being allocated for price and a maximum of 10 points being allocated for a bidder's B-BBEE status level. However, a bidder was

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<sup>1</sup> The wording of the advertisement is not particularly clear and may well have contributed to the problems associated with the applicant's approach to the tender, as shall be seen.

required to score at least 70 points for functionality before it could be considered for further evaluation in terms of the above system.<sup>2</sup>

[5] The applicant submitted a bid by the closing date. The Municipality's BEC disqualified the bid on the basis that the applicant had failed to provide proof of registration with the Construction Industry Development Board ('CIDB') and the necessary grading, as stipulated.<sup>3</sup> Subsequently, the BEC recommended the appointment of the third, fourth, fifth and sixth respondents, which were in turn recommended by the BAC and finally approved by the second respondent on or about 1 September 2020.

[6] It is the above decisions that form the subject of the application.

### **Applicant's submissions**

[7] The applicant admits that it was not registered with the CIDB but points out that such registration was neither possible nor necessary. When it discovered that it had been disqualified, it lodged an objection with the Municipality in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 ('MSA') and requested reasons for the decisions in question. This occurred on 16 October 2020. In the absence of any cooperation on the part of the Municipality, the applicant instituted the present proceedings on 5 May 2021.

[8] With regard to CIDB registration, the applicant confirms that it is a firm of consulting engineers, not a contractor. In any event, the tender documents did not expressly indicate that proof of CIDB registration was a compulsory requirement and clearly called for proposals from consulting engineers such as the applicant. Moreover, the CIDB requires contractors, not consulting engineers, to register with it and to be in possession of an appropriate contractor grading for specific types of construction work. The Construction Industry Development Board Act 38 of 2000

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<sup>2</sup> It is necessary to mention that the above requirements were contradicted elsewhere in the tender documents, as shall be discussed later.

<sup>3</sup> The BEC's reason for its disqualification of the applicant, as apparent from the minutes of the meeting held on 5 August 2020, is that '[n]o CIDB grading required attached [sic].'

(‘the CIDB Act’) expressly prohibits an unregistered contractor from executing work for a public sector contract.<sup>4</sup>

[9] The applicant accepts that registered contractors may combine their resources and form joint ventures (‘JVs’) to improve their grading designation, but membership of a JV is restricted to contractors. This is because each member of the JV must be registered with the CIDB. Here, the third, fourth, fifth and sixth respondents were JVs that consisted of a combination of contractors and consulting engineers. This was impermissible. The Municipality, argues the applicant, was required to have rejected their bids.

[10] The nature of the tender placed it within the ambit of the relevant CIDB guidelines and standards, developed to ensure uniformity in engineering and construction projects. The Municipality failed to ensure compliance therewith in the formulation of the conditions of tender.

[11] The applicant goes on to point out that the BEC disqualified a total of 13 bidders, all consulting engineers or similar, for want of proof of registration with the CIDB. This suggested that they had not interpreted the tender documents in the manner adopted by the BEC. Instead, the tender documents were understood as having required such consulting engineers, after their appointment to the panel, to have appointed contractors in due course, who would have been required to execute the work under supervision.

[12] There was non-compliance, too, argues the applicant, with the provisions of section 112(1) of the Local Government: Municipal Finance Management Act 56 of 2003 (‘MFMA’). The disqualification of the applicant and other bidders had been unfair and had not resulted in procurement that was competitive and cost-effective. Furthermore, the Municipality had failed to comply with the regulations made in terms of the Public Finance Management Act 1 of 1999 (‘PFMA’) inasmuch as it had not applied the relevant CIDB guidelines and standards in relation to the procurement of goods and services for an engineering and construction project.

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<sup>4</sup> See section 18(1) of the CIDB Act.

[13] Pertinently, the applicant observes that the Municipality did not apply the preference point system correctly; it combined the points scored for functionality with those scored for a bidder's B-BBEE status level. No points were awarded for price. This was not lawful and the awards to the third, fourth, fifth and sixth respondents fall to be set aside.

### **Municipality's submissions**

[14] The Municipality avers that it was clear that the tender requested proposals with regard to the provision of services for both consulting engineering and construction work. The terms of reference in the tender documents stated explicitly that construction work was required, meaning that the involvement of a properly registered contractor was necessary. How potential bidders complied with such a requirement was for them to decide.

[15] The tender documents also stipulated that the failure to submit any of the identified documentation would result in disqualification. During the evaluation of the applicant's bid, the BEC ascertained that it was not accompanied by a certificate of registration from the CIDB; there was no indication that the applicant was properly registered and that it was in possession of the required grading designation.<sup>5</sup> Consequently, the BEC deemed the applicant's bid to be non-responsive and disqualified the applicant from further evaluation.

[16] As a result of such disqualification, argues the Municipality, the applicant had no legal interest in the outcome of the tender process. It was unable to participate further therein. Moreover, contractual rights accrued to the third, fourth, fifth and sixth respondents upon their appointment to the panel, thereby preventing the applicant from relying on the appeal mechanism created in terms of section 62 of the MSA, as it had attempted to do.<sup>6</sup>

[17] The Municipality raises a number of distinct arguments.

<sup>5</sup> The applicant contends that the tender documents indicated that a minimum grading of 5CEPE or 6CE was necessary.

<sup>6</sup> The provisions of section 62(3) of the MSA provides that an appeal authority, as identified in sub-section (4), must consider an appeal and confirm, vary or revoke a decision taken in terms of a delegated power or duty, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result thereof.

[18] The first argument is that the applicant became aware of the decisions that form the subject of this application on or about 16 October 2020; however, it only instituted proceedings on 5 May 2021, after the 180-day period stipulated under PAJA. Accordingly, the court cannot entertain the application in view of the applicant's unreasonable delay.

[19] The second argument is that there is no reviewable decision before the court. This is based on the following reasoning: (a) the applicant's bid was not an 'acceptable tender', as contemplated under the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA'),<sup>7</sup> because it failed to meet the minimum qualifying score for functionality; (b) the applicant never entered into a JV, which may have enabled it to comply with the need to demonstrate registration with the CIDB and an acceptable grading designation; and (c) consequently, the applicant could not allege that the Municipality's decisions amounted to administrative action, inasmuch as the failure to submit an acceptable tender did not give rise to any rights that could have been affected by such decisions. Simply put, the applicant lacked *locus standi*.

[20] The third argument is that it was not necessary for a bidder to have indicated a price for the services to be provided; in fact, it was not feasible to have done so because the professional fees payable to a consulting engineer are based upon the final cost of the construction works. An estimate of the cost could only be made after the award of the tender, when the appointed panel members would undertake investigations and thereupon prepare technical reports, business plans and designs for the works required. In any event, argues the Municipality, the three-year appointment meant that it was not possible to determine cost for the full duration of the period involved.

[21] The fourth argument is allied to the above insofar as the nature of the services to have been procured did not permit the determination of price when viewed within the context of the implementation of the WSIG programme. This entailed an investigation into the status of water services for each local municipality so that the nature and extent of any infrastructure refurbishment or upgrade could be

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<sup>7</sup> The definitions contained in section 1 of the PPPFA describe an 'acceptable tender' as one that, in all respects, complies with the specifications and conditions of tender, as set out in the tender documents.

ascertained, whereupon a successful bidder would be expected to develop the necessary business plan for the works required. Until then, it would be impossible to calculate the value of the projects in question or the price of the services to be provided. This approach had to be contrasted with one in which the Municipality itself undertook the investigation and developed the requisite business plan, which would be a much lengthier process, ill-suited to the short-term funding nature of the WSIG programme.

[22] The fifth argument is that there is no basis for the applicant's dissatisfaction with the manner in which the Municipality carried out the evaluation and adjudication of the bids received. The BEC disqualified the applicant's bid for want of proper registration with the CIDB and a minimum grading designation. These were conditions of the tender. The successful bidders all submitted bids as JVs, which included contractors that met the stipulated requirements.

[23] The sixth argument pertains to the appropriate remedy that should be made in the event that the court finds that the decisions in question are reviewable and should be set aside. To that effect, the Municipality asserts that the successful bidders have already embarked upon the projects to be carried out in terms of the WSIG programme. If a new tender process is commenced, then this will have an impact on the benefits intended by the implementation of the above programme for the affected communities and may result in the Municipality's forfeiture of the available funds. Accordingly, argues the Municipality, the court ought not to set aside the decisions.

[24] In relation to the specific allegations made by the applicant, the Municipality avers that the third, fourth, fifth and sixth respondents all met the necessary CIDB registration and designated grading requirements. The Municipality also points out that the applicant's reliance on the CIDB guidelines and standards is misplaced because the tender requested proposals for a turnkey solution, entailing the provision of services by both consulting engineers and contractors. The tender was not limited to construction work, which would otherwise have fallen within the ambit of the CIDB regulatory regime.

### **Third, fourth, fifth and sixth respondents' submissions**

[25] The respondents, at the outset, take the same point made by the Municipality with regard to the applicant's unreasonable delay in the institution of proceedings. The applicant was aware of the Municipality's decisions by at least 16 October 2020; it only brought the present application on 5 May 2021, after the expiry of the 180-day period indicated in PAJA. Consequently, the court has no authority to entertain the application.

[26] Similarly, the respondents assert that by reason of the applicant's not being registered with the CIDB or having a grading designation in terms of the CIDB Act and its regulations, it was precluded from providing services to the Municipality. This could have been avoided had it entered into a suitable JV. Consequently, the applicant's bid did not amount to an acceptable tender and the Municipality's decision to reject it did not give rise to a reviewable administrative action.

[27] Like the Municipality, the respondents also take issue with the applicant's criticism of the evaluation and adjudication of the bids, pointing out that the tender documents indicated that price would not be taken into consideration for the allocation of preference points. This was because of the nature of the services to be procured by the Municipality, which were incapable of price determination.

[28] The respondents align themselves with the remaining arguments raised by the Municipality. These will not be repeated.

[29] Turning to the applicant's allegations *per se*, the respondents describe themselves as unincorporated joint ventures, comprising a combination of consulting engineers and contractors in each instance. They reiterate that the applicant was disqualified because it could not lawfully carry out any construction works (on its own) and simply lacked the capacity to provide the turnkey solution required by the Municipality. A bidder had to demonstrate how it would meet the tender conditions pertaining to the need for the services of a contractor; the applicant failed to do so. Furthermore, argue the respondents, the applicant has misunderstood the CIDB regulatory regime inasmuch as it did not prohibit the formation of JVs between



consulting engineers and contractors for purposes of supplying a turnkey solution to a client such as the Municipality, as opposed to the execution of construction work only, which was not the case here. If the applicant was correct, then it would not be possible for a lawful turnkey solution to exist; consulting engineers could never be registered with the CIDB.

### **Issues to be decided**

[30] As a starting point, it is necessary to decide whether the court can entertain the matter, notwithstanding the alleged unreasonable delay on the part of the applicant with regard to the institution of proceedings. The provisions of section 7 of PAJA apply.<sup>8</sup>

[31] If the court is satisfied that it can indeed entertain the matter, then it must decide whether the applicant has a justiciable right that deserves protection against unlawful administrative action. This will entail an analysis of the Municipality's disqualification of the applicant's bid and the legal consequences thereof.

[32] Assuming that a justiciable right can be identified, the court must then decide whether the tender process followed by the Municipality was lawful; in the event that it was not, it will be necessary to decide what remedy would be most appropriate in the circumstances.

### **Unreasonable delay**

[33] The alleged unreasonable delay on the part of the applicant stems from the provisions of section 7(1) of PAJA. These are set out below:

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<sup>8</sup> In particular, section 7(1) of PAJA requires proceedings for judicial review to be instituted without unreasonable delay and not later than 180 days after the date on which: (a) any proceedings instituted in terms of internal remedies have been concluded; or (b) where no such remedies exist, the person concerned was informed of the administrative action, became aware thereof and the reasons for it or might reasonable have been expected to have become aware thereof.

'(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—

- (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

[34] For the sake of completeness, the above provisions must be read with subsection (2), which provides as follows:

'(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

[35] The appeal mechanism created under section 62 of the MSA permits a person whose rights have been affected by a decision taken in terms of a delegated power or duty to appeal against such a decision by giving written notice and reasons therefor to the municipal manager within 21 days of the notification of the decision.<sup>9</sup>

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<sup>9</sup> Section 62(1) of the MSA. The text provides that:

This constitutes an internal remedy within the context of section 7 of PAJA. See *Municipality of the City of Cape Town v Reader and others* [2009] JOL 22725 (SCA), *Groenewald NO and others v M5 Developments (Cape) (Pty) Ltd* [2011] 1 All SA 17 (SCA), and *JDJ Properties and another v Umngeni Local Municipality and another* [2013] 1 All SA 306 (SCA).<sup>10</sup>

[36] The court requested the parties, subsequent to the hearing, to make submissions in relation to whether the applicant had instituted proceedings in terms of an internal remedy, whether same had been concluded or exhausted, and the extent to which the decision in *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and others* [2014] 3 All SA 560 (ECG) was decisive in the present matter. In that regard, a full bench for this division held that review proceedings could only be instituted once one of two requirements had been met: all internal remedies had been exhausted or exemption had been obtained. The applicant in that matter failed to apply for such exemption and was accordingly prohibited from having instituted review proceedings before lodging an appeal under section 62 of the MSA.<sup>11</sup>

[37] The applicant argues that it indeed instituted proceedings under section 62 when it sent a letter to the 'SCM Manager' for the Municipality on 16 October 2020, pursuant to its having been informed about the award of the tender after a telephonic enquiry to that effect on the same date. The letter states as follows:<sup>12</sup>

'Dear Sir

This letter serves to register our formal objection to your decision to reject the bid submitted by Tekoa Consulting Engineers (Pty) Ltd to the above referenced tender.

Please furnish us with the reasons for the rejection of our bid.

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'A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.'

<sup>10</sup> See, too, *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and others* [2014] 3 All SA 560 (ECG), decided by a full bench in this division, as discussed further.

<sup>11</sup> At [60] and [73] – [74].

<sup>12</sup> The addressee is understood to be the relevant official responsible for the Municipality's supply chain management functions.

In terms of Section 62 of the Municipal Systems Act, unsuccessful bidders are afforded the opportunity to appeal the rejection of their bid and as such please receive our letter in the spirit of enhancing the Supply Chain Management System as opposed to the contrary.

Should you have any queries please don't hesitate to contact the undersigned.

Yours sincerely

Mr T Melato

Executive Director

For and on Behalf of the Board and Management of Tekoa Engineering Consulting (Pty) Ltd'

[38] The applicant asserts that the Municipality failed or refused to implement the appeal mechanism, despite a further request made on 8 March 2021. Consequently, the applicant's attempts to exhaust the available internal remedy were frustrated by the Municipality, leaving the applicant with no alternative but to institute review proceedings. In any event, argues the applicant, it has already sought an exemption from its obligation to exhaust such remedy.<sup>13</sup>

[39] The Municipality merely contends that the applicant knew about the decision to award the tender as early as 16 October 2020 but delayed the institution of review proceedings until 5 May 2021. This was well after the 180-day period prescribed in terms of section 7(1) of PAJA. In the absence of an application for the extension of the above period, as envisaged under section 9(1), the application cannot be entertained and ought to be dismissed without further ado.

[40] The third, fourth, fifth and sixth respondents point out that the applicant's reliance on section 62 of the MSA was misconceived. This was because the internal remedy is only applicable where the decision was taken in terms of a delegated power or duty. Furthermore, no variation or revocation of such decision by the appeal authority may detract from any rights that may have accrued as a result of the decision; the Municipality's appointment of the above respondents to the panel on or about 1 September 2020 gave rise to such rights.<sup>14</sup>

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<sup>13</sup> This appears at paragraph 6 of its amended notice of motion, dated 23 August 2021.

<sup>14</sup> See section 62(3) of the MSA.

[41] It is not disputed that the second respondent made the award of the tender upon the recommendation of the BAC. He did so in terms of the provisions stipulated under regulation 29(1)(b) of the Municipal Supply Chain Management Regulations, whereby the BAC is enjoined to make a final award or make a recommendation to the accounting officer (i.e. the second respondent) to make such award, depending on the extent of the BAC's delegated authority. This must be read with section 115(1)(a) of the MFMA, which places an overall duty on the accounting officer to implement a supply chain management policy for the municipality in question.

[42] In *Maximum Profit Recovery (Pty) Ltd v Inxuba Yethemba Local Municipality and others* (1712/2020) [2021] ZAECGHC 11 (16 February 2021), Bloem J held that an accounting officer's power to award a tender is an original power, regulated by the MFMA and the regulations made in terms thereof.<sup>15</sup> This court respectfully agrees therewith; the second respondent's decision to appoint the third, fourth, fifth and sixth respondents was not taken under a delegated power. Accordingly, the provisions of section 62 do not apply in the present circumstances and the third, fourth, fifth and sixth respondents are correct to assert that the applicant's reliance thereon, as evident from the correspondence sent on 16 October 2020 and 8 March 2021, was misplaced. No internal remedy was available to the applicant.<sup>16</sup> The decision in *Evaluations Enhanced Property Appraisals* has no bearing on the matter.

[43] The question that subsequently arises is when the 180-day period actually commenced. The provisions of section 7(1)(b) of PAJA stipulate that this must be calculated from the date on which the applicant was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons. The Municipality and remaining respondents contend that the date in question was 16 October 2020, when the applicant first came to know about the decision to award the tender.

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<sup>15</sup> *Maximum Profit Recovery*, at [16] – [17].

<sup>16</sup> Consequently, there is no need to consider the second part of the above respondents' argument to the effect that the section 62 route was not available to the applicant because any variation or revocation of the original decision was not permitted to detract from any rights that already accrued. This would have rendered the appeal mechanism ineffective. See *Municipality of the City of Cape Town v Reader and others* [2009] JOL 22725 (SCA), which confirmed the principle laid down by the full bench in the court *a quo* to the effect that the original decision cannot be reversed on appeal where it takes away the right that was initially granted. The principle was affirmed by this division in *ESDA Properties (Pty) Ltd v Amathole District Municipality and others* (2635/2014) [2014] ZAECGHC 76 (18 September 2014), at [13].

[44] However, this overlooks the fact that the applicant was not aware of the reasons for the decision at that stage. Whereas section 7(1)(b) seems to suggest that the 180-day period may be calculated simply from the date when a party was first informed of the decision, this must be interpreted to mean that the party must have been provided with a proper set of facts or information, including the reasons for such decision. This is consistent with the alternatives indicated under section 7(1)(b), which both require the party to be in possession of the reasons before the 180-day period commences. Were it not so, a party could find itself in a situation where it would be constrained to institute review proceedings purely to avoid the time-bar but without entirely knowing why otherwise, notwithstanding possible attempts made to obtain reasons from the procuring entity.<sup>17</sup>

[45] In *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC), the Constitutional Court supported the findings of the Supreme Court of Appeal to the effect that section 7(1)(b) did not mean that a review application had to be launched within 180 days after a party became aware that an administrative action was tainted by an irregularity. The apex court held as follows:

[41] On a textual level the City's contention confuses two discrete concepts: *reasons* and *irregularities*. Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.

[42] On a purposive level the City's interpretation would give rise to undesirable outcomes. As the SCA pointed out, the City's interpretation would–

“automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to [Aurecon] and the public interest in the finality of administrative decisions and the exercise of administrative functions.”

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<sup>17</sup> See Plasket J's observations in that regard, *Joubert Galpin Searle and others v Road Accident Fund and others* [2014] 2 All SA 604 (ECP), at [52] – [55].

[46] The 180-day period begins from the date upon which a party was informed or became aware of the decision taken and reasons therefor or might reasonably have been expected to have acquired such knowledge. Within the context of the present matter, it cannot be said that, by 16 October 2020, the applicant had been informed or was aware of the reasons for the Municipality's decision to award the tender to the third, fourth, fifth and sixth respondents and not to the applicant. This is patently clear from the letter that it sent on such date, in terms of which reasons were requested. The request was repeated on 8 March 2021 but to no avail. In terms of section 5(1) of PAJA, a party such as the applicant has 90 days within which to request reasons, calculated from the date upon which the party became aware of or might reasonably have been expected to have become aware of the decision. The applicant was within time. Consequently, section 5(2) provides that an administrator such as the second respondent has 90 days within which to give adequate reasons in writing, calculated from the date upon which he or she received the party's request. If the administrator fails to do so, then, in terms of section 5(3), it must be presumed for purposes of review proceedings, in the absence of proof to the contrary, that the decision was taken without good reason. The earliest date upon which the 180-day period could have commenced would have been upon the expiry of the 90-day period from when the applicant first requested reasons. This would have been 14 January 2021. Accordingly, the applicant's institution of review proceedings on 5 May 2021 was well within the 180-day period.

[47] In the circumstances, there was no unreasonable delay on the part of the applicant. The court is satisfied that it can entertain the matter and proceeds to the next issue, viz. whether the applicant has a justiciable right capable of protection, notwithstanding its disqualification on the basis of non-responsiveness.

### **Failure to submit an acceptable tender**

[48] The Municipality argues that the applicant's failure to have submitted proof of registration with the CIDB or to have had the requisite grading designation meant that its bid had to be treated as non-responsive. This was in accordance with the strict approach adopted by the Supreme Court of Appeal in *Dr JS Moroka*

*Municipality and others v Betram (Pty) Ltd and another* [2014] 1 All SA 545 (SCA) and subsequently followed in *WDR Earthmoving Enterprises and another v Joe Gqabi District Municipality and others* (392/2017) [2018] ZASCA 72 (30 May 2018).<sup>18</sup> The result of the ensuing disqualification was that the applicant acquired no legal interest in the outcome of the tender process. It could not claim that the Municipality's decision to award the tender to the third, fourth, fifth and sixth respondents, to the exclusion of the applicant, had adversely affected its rights. The decision did not meet the definition of administrative action.

[49] The third, fourth, fifth and sixth respondents adopt a similar approach and contend that the applicant's failure to have complied with the conditions of the tender and the requirements of the CIDB Act meant that no rights had accrued to the applicant. The subsequent decision of the Municipality could not, vis-à-vis the applicant, be viewed as administrative action. In any event, assert the respondents, the applicant would never have met the functionality requirements for it to have been further evaluated and adjudicated.

[50] It is important to emphasise that the Municipality's decision to treat the applicant's bid as non-responsive is the issue in question. This is the decision that lies at the heart of the respondents' argument. Whether the applicant would actually have obtained sufficient points for functionality is not relevant for present purposes.

[51] From the minutes of the BEC meeting held on 5 August 2020, it is evident that the reason for why the BEC disqualified the applicant was because 'no CIDB grading required attached [sic]'. The Municipality elaborated upon this in the opposing affidavit of the second respondent within the context of Part A of the application, stating that the applicant's bid had not been accompanied by a certificate of registration from the CIDB and that there was therefore no indication that the applicant was properly registered or that it was in possession of the required grading designation of 5CEPE or 6CE or higher. The conditions of tender had made it clear that such a certificate had constituted supplementary information that had been required from all bidders; the failure to supply same would result in disqualification.

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<sup>18</sup> See, too, *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* [2018] 2 All SA 644 (SCA).



[52] The difficulty with the above assertions is that the alleged requirement is not at all apparent from the conditions of tender. Admittedly the tender envisaged the involvement of a contractor or contractors for the successful execution thereof. The preamble to the RFP and the description of the scope of services to be provided unequivocally indicated that a successful bidder was required to render construction work in relation to the implementation of the various water services projects intended for the numerous rural communities that fell within the Municipality's jurisdiction. The assessment of a bidder's functionality, too, provided for the evaluation of a combination of criteria that were distributed between a 'consulting entity' and a 'contractor entity'. However, the tender does not expressly stipulate the condition that a bidder was required to submit a certificate of registration from the CIDB, failing which disqualification would follow. This is not apparent from the tender notice and invitation to tender. It is not apparent from the checklist. It is not apparent from the eligibility criteria.

[53] The closest to which such condition comes is the requirement that a bidder must submit a company profile, which must include 'proof of registration with professional bodies (e.g. CIDB, LGSETA)- if applicable'.<sup>19</sup> The applicant has carefully explained why it was impossible for it to have obtained a certificate of registration from the CIDB; it is not a contractor. In other words, the certificate in question was not applicable.

[54] The respondents rely further on the stipulation that

[the] failure to supply all required and supplementary information will result in the tender being deemed non-responsive; and therefore the tender will not be considered for award.<sup>20</sup>

[55] The stipulation must, however, be interpreted in context. It comes at the conclusion of a list of 'compulsory submissions', comprising items such as a valid SARS pin number, a municipal clearance certificate, a certified copy of a B-BBEE certificate, and so forth. Proof of registration with the CIDB is not listed. If the stipulation was to be interpreted so to apply to information indicated elsewhere in the

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<sup>19</sup> The requirement appears under the heading, 'Company profile', at the eighth bullet point, p 329 of the record.

<sup>20</sup> This appears in the tender notice and invitation to tender, p 288 of the record.

tender, then what exactly would fall into the set of 'required and supplementary information'- and, conversely, what would fall outside? The stipulation is too vague to permit the respondents to make the argument that this applied to the supply of proof of registration with the CIDB.

[56] In *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (1) BCLR 1 (CC), the Constitutional Court dealt with the subject of vagueness insofar as it pertained to a tender. The court observed as follows:

[88] There is another, related concern with the clarity of administrative action: vagueness can render a procurement process, or an administrative action, procedurally unfair under section 6(2)(c) of PAJA. After all, an element of procedural fairness- which applies to the decision-making process- is that persons are entitled to know the case they must meet.

[89] Section 3(2)(b)(i) and (ii) of PAJA reads in part:

"In order to give effect to the right to procedurally fair administrative action, an administrator... must give—

- (i) adequate notice of the nature and purpose of the proposed administrative action; [and]
- (ii) a reasonable opportunity to make representations."

[90] In the context of a tender process, the tender documents give notice of the proposed administrative action, while the responding bids in effect constitute representations before the decision is made. Adequate notice would require sufficient information to enable prospective tenderers to make bids to cover all the requirements expected for the successful award of the tender.'

[57] The conditions of tender must spell out, clearly and unambiguously, what is required of a bidder. There must be no vagueness or lack of clarity about what constitute the 'rules of the game', so to speak.

[58] Under section 1 of the PPPFA, the definition of an 'acceptable tender' is one that, in all respects, complies with the specifications and conditions of tender as set out in the tender document. In the present matter, it was not apparent that the

submission of proof of registration with the CIDB was a mandatory requirement. Any suggestion to that effect was vague at best. Insofar as the applicant can be criticised for not having formed a JV with a contractor or for not having adopted a bid strategy that addressed the indication from the tender that the involvement of a contractor or contractors would be necessary for the execution of the construction work required, that is a matter that has a bearing on functionality, not bid responsiveness. It cannot be argued that the applicant's failure to submit proof of registration with the CIDB had the implication that its bid did not meet the definition of an acceptable tender.

[59] Consequently, the Municipality's decision to disqualify the applicant's bid on the above basis was an irregularity. It had an adverse impact on the rights of the applicant. Moreover, it had a direct, external legal effect inasmuch as it eliminated a potential service provider from the tender process for the supply of goods and services necessary for the planning, design and construction of WSIG-funded projects in the north-eastern corner of the Eastern Cape Province, which is home to many rural communities for whom the adequate supply of water services is an essential aspect of everyday life. The court is satisfied that the decision was an example of administrative action and that it is reviewable within the context of the factual matrix that informs the present application.

[60] The above finding must be taken into consideration when assessing the overall lawfulness of the tender process itself and the awards made.

### **Lawfulness of the tender process**

[61] The applicant has gone to considerable lengths to demonstrate that the tender process failed to include or implement the CIDB guidelines and standards. The respondents contend that by reason of this being a turnkey tender, entailing not only construction work but also the provision of engineering services, the conditions of tender could not have been made subject to the restrictions imposed by the CIDB Act.

[62] At a more fundamental level, however, the applicant points out that the Municipality did not apply the preference point system correctly for purposes of the

evaluation and adjudication of the bids received. It is common cause that the tender combined the points scored for functionality with those scored for a bidder's B-BBEE status level. Price was not taken into consideration.

[63] The PPPFA prescribes the framework for the implementation of a preferential procurement policy. To that effect, section 2(1) provides as follows:

'(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

- (a) a preference point system must be followed;
- (b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;  
  
(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;
- (c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
- (d) ...
- (e) ...
- (f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and
- (g) ...'

[64] The preamble to the PPPFA makes it clear that the legislation was enacted to give effect to the constitutional principle that contracts may be allocated in accordance with categories of preference and the principle that a procurement policy

may be implemented by an organ of state in such a way as to protect or advance persons disadvantaged by unfair discrimination. Simply on the basis of the weight attached to it in accordance with the prescribed preference point system, however, the overriding importance of price in the evaluation and adjudication of bids is obvious. This stands to reason inasmuch as cost-effectiveness is one of the five cardinal principles for public procurement practices in South Africa, as stipulated under section 217(1) of the Constitution.

[65] An organ of state has no discretion with regard to the inclusion or otherwise of price when it follows its preference point system. The framework prescribed by the PPPFA, read with the principles indicated under section 217(1) of the Constitution, is the basis upon which a preferential procurement policy must be determined and implemented. See *Moseme Road Construction CC and others v King Civil Engineering Contractors (Pty) Ltd and another* [2010] 3 All SA 549 (SCA), at [2].<sup>21</sup>

[66] In the present matter, the respondents contend that it was neither necessary nor feasible for price to have been included in the preference point system. It was only possible to estimate the final cost of the various water services projects entailed after the successful bidders had undertaken the requisite investigations. The final cost of the construction works would, in turn, determine the professional fees payable to the consulting engineers. Moreover, the three-year appointment of the successful bidders had the implication that it was not possible to determine a price for the full duration of the tender. The respondents go on to argue that price determination was not feasible in terms of the WSIG programme. An assessment of the condition of water services for each local municipality was necessary so that a successful bidder could develop a business plan for the infrastructure refurbishment or upgrade that was actually required. If the Municipality attempted to do this itself, then the exercise would take much longer, which would not accommodate the short-term funding nature of the WSIG programme.

[67] This may be so. However, there is no reason on the papers why a different procurement model could not have been adopted to suit the circumstances, one which addressed the concerns raised above and which also complied with the

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<sup>21</sup> See, too, *AllPay*, at [45].

prescribed legal framework. For example, a two-stage bidding process may have allowed bidders to submit unpriced proposals, based on a general set of specifications for the water services required; subsequent to engagement with the Municipality in relation to various technical or commercial parameters, an amended and priced proposal could then be submitted by a short-listed bidder, for final evaluation and adjudication.<sup>22</sup>

[68] The Municipality has argued that the applicant accepts the lawfulness of the tender insofar as it seeks to be appointed to the panel, yet challenges its lawfulness insofar as it seeks to have the award thereof to the third, fourth, fifth and sixth respondents set aside. This cannot be done, asserts the Municipality; a litigant cannot approbate and reprobate. To that effect, the Municipality refers to *Chamber of Mines of South Africa v National Union of Mineworkers and another* 1987 (1) 668 (AD), where Hoexter JA held, at 690D-G, that, in a situation where a party is faced with two alternative and entirely inconsistent courses of action or remedies, the law 'will not allow that party to blow and cold', he or she must make an election.<sup>23</sup>

[69] The above contentions are more apposite to a contractual dispute, where, for example, a party must decide whether to cancel a contract in the event of a material breach by the other party or insist on due performance; it cannot do both. In the present matter, the applicant has enforced a constitutional right to just administrative action, rather than a contractual right. The court understands the relief sought by the applicant to be, *inter alia*, an order for the decision not to award the tender to the applicant to be reviewed and set aside and that the applicant be appointed to the panel; *alternatively*, that the decision to award the tender to the third, fourth, fifth and sixth respondents be reviewed and set aside, and that the tender be remitted back to the BEC and BAC for reconsideration. The relief sought by the applicant hinges on the extent to which the court finds such decisions to be unlawful administrative action. This is not so much a situation where the applicant has created mutually destructive or contradictory courses of action as one in which it has astutely sought

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<sup>22</sup> National Treasury has recommended a two-stage bidding process for turnkey or projects in relation to 'large complex plants or works of a special nature, when it may be undesirable or impractical to prepare complete detailed technical specifications in advance.' See National Treasury, 'Supply Chain Management: A Guide for Accounting Officers / Authorities' (February 2004), para 4.7.9, at 33; accessed at <http://www.treasury.gov.za/divisions/ocpo/sc/Guidelines/SCM%20Jan900-Guidelines.pdf> (8 June 2022).

<sup>23</sup> See, too, *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* [1996] 1 All SA 509 (C), at 513.

to mitigate against the risk of adverse findings by the court in relation to the nature of the decisions taken by the Municipality.

[70] Furthermore, the Municipality makes the point that the applicant ought to have challenged the lawfulness of the tender when it was first issued. Instead, the applicant participated in the tender and only cried foul afterwards. It must be bound by its election.

[71] This is a similar argument to the one already discussed above, attracting the common law principles of waiver and estoppel. It ignores, however, one of the basic tenets of the principle of legality, as enunciated in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Municipal Council* 1999 (1) SA 374 (CC), where the Constitutional Court held, at [58], that

‘the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.’

[72] Irrespective of the approach taken by the applicant, if the court finds that the Municipality exercised and performed powers and functions beyond those prescribed in terms of section 217(1) of the Constitution or section 2(1) of the PPPFA, then a declaration of unlawfulness must follow. This will subsequently determine the relief to be granted.

[73] The applicant’s election to participate in the tender cannot be taken to mean that it waived its right to challenge the lawfulness thereof later, upon proper reflection and after having obtained appropriate professional advice. To hold otherwise would severely infringe its right to just administrative action. If indeed a party can waive a constitutional right in these circumstances, then there would, at the least, have to be evidence of an express and unequivocal assertion to that effect.<sup>24</sup> No such evidence appears from the papers.

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<sup>24</sup> See *Mohamed and another v President of the RSA and others* 2001 (7) BCLR 685 (CC), at [61] – [67], where the court discussed whether or not a foreign national could be deemed to have consented to his deportation or extradition to the United States in circumstances where the prosecuting authority intended to press capital charges.

[74] All of the respondents, including the Municipality, contend, too, that if the applicant had found fault with the tender, then it ought to have instituted review proceedings immediately after the issue thereof. This was not done and the applicant is precluded from doing so now by reason of the time-bar provisions contained in section 7(1) of PAJA. The respondents cite *Airports Company of South Africa SOC Ltd v Imperial Group Ltd and others* [2020] JOL 46607 (SCA), where the Supreme Court of Appeal considered a request for bids ('RFB') that had been advertised by the appellant in relation to the hiring of car rental kiosks and parking bays at airports operated by it in various cities. The respondent sought an order reviewing and challenging the RFB on the basis of its unlawfulness. In a minority judgment, Molemela JA held that the decision to advertise the RFB constituted administrative action that was ripe for judicial challenge and that the respondent was entitled to have launched review proceedings without having to await formal notification of the outcome of the RFB.<sup>25</sup>

[75] This court respectfully agrees with (and considers itself bound by) the above findings. The applicant in the present matter has, however, not challenged the Municipality's decision to advertise the tender. It has challenged the decision to disqualify the applicant's bid, alternatively the decision to award the tender to the third, fourth, fifth and sixth respondents, with the implication that the court is required to determine the lawfulness thereof in light of the grounds of review stipulated under section 6(2) of PAJA. This exercise necessarily entails an assessment of the basis upon which the decisions were made and by implication the lawfulness of the tender itself. The principles mentioned in *Airports Company* are not relevant to these proceedings; the argument with regard to the operation of the 180-day time bar is misplaced.

[76] The Municipality's combination of points for functionality and B-BBEE status level, to the exclusion of price, amounted to a failure to apply the preference point system correctly, as prescribed in terms of section 2(1) of the PPPFA. It also amounted to a failure to apply the constitutional principle of cost-effectiveness to the process. Effectively, the successful bidders were granted a blank cheque for the

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<sup>25</sup> At [16] - [18].



supply of the goods and services necessary for the various water services projects required for the affected communities.

[77] In terms of section 6(2) of PAJA, a court is granted authority to judicially review an administrative action where, *inter alia*, a mandatory and material procedure or condition prescribed by an empowering provision was not complied with,<sup>26</sup> the action was materially influenced by an error of law,<sup>27</sup> the action was taken for a reason not authorised by the empowering provision or because irrelevant considerations were taken into account or relevant considerations were not considered,<sup>28</sup> or the action itself contravenes a law or is not authorised by the empowering provision.<sup>29</sup> The court is satisfied that the manner in which the Municipality applied the preference point system and its consequent decision to award the tender to the third, fourth, fifth and sixth respondents tender gave rise to one or more of the above grounds for review. The tender process was unlawful and the court is required to decide what remedy would be most appropriate in the circumstances.

### **Appropriate remedy**

[78] In *AllPay*, the Constitutional Court held, at [25], that

[o]nce a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.'

[79] The determination of an appropriate remedy is possibly the most difficult part of the court's duty in circumstances such as these. The applicant's right to just administrative action and the public's interest in the promotion of the efficient, economic and effective use of resources by the state<sup>30</sup> must be weighed against the

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<sup>26</sup> Section 6(2)(b).

<sup>27</sup> Section 6(2)(d).

<sup>28</sup> Section 6(2)(e)(i) and (iii).

<sup>29</sup> Section 6(2)(f)(i).

principle that public administration must be development-oriented<sup>31</sup> and the fact that the three-year appointment of the successful bidders for the planning, design and construction required in relation to WSIG-funded water services projects is already well past the half-way mark,<sup>32</sup> with much of the tender already having been executed and plans made to carry out whatever work remained.

[80] At the conclusion of argument, the court directed the parties to submit further affidavits to address what would constitute an appropriate remedy in the event that the court found that the decisions that form the subject of this application were indeed unlawful. The purpose of such further affidavits was, *inter alia*, to provide an indication of the status of the various projects arising from the award of the tender so as to allow the court to assess the possible impact that an order would have on the communities who stood to benefit from the implementation of the tender.

[81] The Municipality stated that projects were being implemented at 14 different sites and indicated the expenditure already incurred, the outstanding amount still to be spent, and the progress made towards completion (expressed as a percentage). This information is summarised in the table below.

<b>Municipality</b>	<b>Village</b>	<b>Expenditure</b>	<b>Outstanding</b>	<b>Completion</b>
Winnie Madikizela-Mandela Local Municipality	Matwebu	R7,273,417	R1,792,817	96%
	Dudumeni	R4,765,091	R1,139,995	66%
	Nyaka	R378,002	Nil	100%
Umzimvubu Local Municipality	Mount Horeb	R4,660,617	R1,903,320	86%
	Gobizembe	R919,799	R1,577,458	100%
	Ndum-Ndum	R1,159,507	R3,468,679	70%

<sup>30</sup> In terms of section 195(1) of the Constitution, public administration must be governed by the democratic values and principles enshrined in the Constitution, including the principle that 'efficient, economic and effective use of resources must be promoted'.

<sup>31</sup> Section 195(1)(c) of the Constitution.

<sup>32</sup> The tender stipulated that the appointment to the panel would be for a period of three years. The Municipality appointed the third, fourth, fifth and sixth respondents on or about 1 September 2020, meaning that the appointment will expire on or about 31 August 2023.

	Dangwana	R996,304	R6,834,615	100%
Matatiele Local Municipality	New Stands	R1,361,849	R3,791,593	43%
	Zimpofu	R4,757,395	R184,562	100%
	Pakaneng	R2,693,214	R786,059	100%
	Mbizeni	R7,026,730	R398,899	100%
Ntabankulu Local Municipality	Zinyosini	R5,078,862	R857,706	0%
	Zamukulungisa	R314,084	R1,893,498	45%
	Mabofu	R7,856,467	R973,551	55%

[82] Notwithstanding the above, further projects are required, which will have a duration of 12 months and an estimated cost of R100 million. The Municipality argues that the interruption of the work that is currently underway and the possible re-evaluation and re-adjudication of the bids would result in rehabilitation costs for the projects still to be finalised, the risk that incomplete works would be vandalised, and delays in the delivery of the water services required by the affected communities.

[83] The remaining respondents have furnished progress reports that correspond, on the whole, with the information supplied by the Municipality. Nevertheless, there are discrepancies. It is clear that a considerable number of projects have already been completed; it also clear that a considerable number of projects are still at the planning stage and have yet to be commenced.

[84] The legislative basis for the granting of an appropriate remedy is section 8 of PAJA. In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121, the Constitutional Court held, at [29], that

'[i]t goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances, the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'

[85] The court went on to remark that section 8 of PAJA confers on a court a 'generous jurisdiction' to make just and equitable orders.<sup>33</sup> The description was affirmed in *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113, where the Constitutional Court held, at [83], that

'[t]his "generous jurisdiction" in terms of section 8 of PAJA provides for a wide range of just and equitable remedies, including declaratory orders, orders setting aside the administrative action, orders directing the administrator to act in an appropriate manner, and orders prohibiting him or her from acting in a particular manner.'

[86] In its further affidavit, the applicant in the present matter argues for the granting of a remedy based on the order made in *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others* [2014] 2 All SA 493 (SCA). Here, the court dealt with a situation where a contract had been concluded pursuant to an unlawful tender process. Moreover, the parties to the contract had acted dishonestly

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<sup>33</sup> *Steenkamp NO*, at [30].

and unscrupulously and the JV involved was not qualified to execute the contract.<sup>34</sup> The court criticised the court *a quo* for having permitted the JV to continue to work, notwithstanding the finding that the award of the tender had been unlawful. The court went on to state, at [24], that

‘[i]n the context of an unlawful tender process for the acquisition of goods and services for the benefit of the public, the finding as to an appropriate remedy must strike a balance between the need for certainty, the public interest, the interests of the successful and unsuccessful tenderers, other prospective tenderers, the interests of innocent parties and the interests of the organ of state at whose behest the tender was invited.’

[87] There is no indication, on the papers, that the parties to these proceedings have acted dishonestly or unscrupulously. The applicant has requested the court to refer the appointment of the third, fourth, fifth and sixth respondents to the Special Investigations Unit (‘SIU’) for investigation into possible acts of corruption and collusion, the violation of the MFMA and overall regulatory framework, and for recover of any unlawful payments made. Inasmuch as the tender made no provision for the allocation of preference points for price, thereby inviting the risk of the abuse of any appointment subsequently made, no evidence appears in the affidavits filed by the parties of any corruption or collusion. There is no basis upon which the court can make the order sought in that regard.

[88] Furthermore, the applicant has requested the court to make an order along the lines of that made by the court in *Esorfranki*. To that effect the respondents would be required to cease all construction activities immediately and the Municipality would be required to enlist the assistance of the Department of Water and Sanitation (‘DWS’) to: appoint an independent engineer to prepare a final project report and submit same to the DWS and SIU; further evaluate the bids that were previously disqualified for alleged lack of compliance with the CIDB Act; call upon the qualifying bidders to submit price proposals for the projects envisaged and make appointments to the panel on the basis of price and preference;<sup>35</sup> issue a tender that

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<sup>34</sup> *Esorfranki*, at [22].

<sup>35</sup> The reference to ‘preference’ is not completely understood but for purposes of the judgment it is assumed that this was a reference to B-BBEE status.

invites qualifying contractors to submit expressions of interest for appointment to the panel; and ensure that the new tender process, described above, is concluded within 45 days. Moreover, the Municipality would be required to implement such temporary measures as may be necessary to ensure that the affected communities are not without water.<sup>36</sup>

[89] The approach proposed by the applicant has its merits. Nevertheless, it is complex and multi-faceted in nature and the court cannot ignore the fact that the respondents (the Municipality in particular) have not had a proper opportunity to deal with the proposal and to inform the court of its feasibility and probable ramifications. Moreover, the DWS would be required to play a significant role in the execution of the order; it is not a party to these proceedings.

[90] In *Esorfranki*, the court remarked, at [20], that

‘[i]n the context of the procurement of goods and services an order declaring the tender process unlawful means that the decision to award the tender and the contract which was entered into pursuant thereto are both void *ab initio*. It has consequently been held that the factual consideration that it may not be practicable to set the award aside must be given due weight in the exercise of the court’s discretion in deciding to declare the administrative action unlawful and set it aside. That discretion takes into account considerations of “pragmatism and practicality”. Its underlying reason is the desirability of certainty.’<sup>37</sup>

[91] Accordingly, the finding by this court that the tender process was unlawful has the consequence that the contracts concluded between the Municipality and the remaining respondents are void *ab initio* and unenforceable. From the information supplied by the respondents, a pragmatic approach is nevertheless called for with regard to the projects that are near to completion. There is a small number that remain and it would be in the interests of the Municipality and the remaining respondents, but more especially the affected communities, that whatever

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<sup>36</sup> The applicant has suggested that such measures include the use of water carts or trucks. Whether this is viable for the affected communities is not at all apparent.

<sup>37</sup> See, too, *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* 2008 (4) SA 43 (SCA), at [13]; *Chairperson, Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others* 2008 (2) SA 638 (SCA), at [27] – [28]; and *Eskom Holdings Ltd and another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA), at [9].

outstanding work needs to be carried out in relation thereto be allowed to continue for a limited period of time. Insofar as the parties may not be in agreement about which projects are near to completion, the DWS, under whose auspices the WSIG programme is being implemented, can be requested to intervene. It would, however, not be in the interests of the applicant, other prospective bidders, or the public at large, to permit the completion of those projects that are not near to completion or to permit further projects to proceed. From the contents of the Municipality's further affidavit, it is evident that the amount still to be spent on incomplete projects is significant, while the estimated cost of R100 million for further projects evokes the earlier comments made by the court in relation to the granting of a blank cheque for the supply of the necessary goods and services. This cannot be tolerated.

### **Relief and order**

[92] The relief to be granted has as its basis the provisions of section 8(1) of PAJA. The precise details thereof are informed by the alternative relief sought by the applicant in terms of its amended notice of motion.

[93] In the circumstances, the court is persuaded that it would be just and equitable to declare the tender process to be unlawful and to set aside the appointment of the third, fourth, fifth and sixth respondents. For obvious reasons, there would be no basis upon which to remit the evaluation and adjudication of the bids back to the BEC and BAC for reconsideration. Similarly, as already discussed, there would be no basis upon which to refer the matter to the SIU for investigation.

[94] Furthermore, by reason of the likely impact on the affected communities, it would be just and equitable to suspend the declaration of unlawfulness for a limited period of time so as to allow the completion of those projects that are near to completion, where the outstanding work to be carried out is minimal. There is no basis whatsoever to permit the third, fourth, fifth and sixth respondents to commence or continue with any further projects.

[95] In relation to costs, the court acknowledges that the applicant has been mostly successful in its application, it has vindicated its right to just administrative action. Nevertheless, it cannot be said that it has secured, overwhelmingly, the relief that it sought. In that regard, the court has declined to appoint it to the panel or to order that the Municipality distribute work orders amongst the various service providers; the court has also declined, in relation to the alternative relief sought, to remit the matter back to the BEC and BAC for reconsideration; furthermore, the court has declined to refer the matter to the SIU. Consequently, the court is obliged to take the above into consideration when deciding an appropriate costs order.

[96] With regard to the Municipality, however, its unhelpful conduct in relation to the applicant's request for reasons for the decision to disqualify the applicant's bid and to appoint the third, fourth, fifth and sixth respondents cannot be overlooked. Moreover, its blatant disregard for the preference point system prescribed by the PPPFA and the overriding constitutional principle of cost-effectiveness within the context of a tender of this magnitude must attract the criticism of the court.

[97] Insofar as the remaining respondents are concerned, there is no evidence on the papers of the corruption or collusion alleged by the applicant. Whereas blame cannot be laid at their feet for the declaration of unlawfulness that follows, the remaining respondents nevertheless elected to oppose the application; ultimately, this has proved unsuccessful.

[98] The following order is made:

- (a) the tender process followed by the first respondent with regard to the evaluation, adjudication and award of bid number ANDM/IDMS-WSA/148/04/05/20, Request for Proposals for the Panel of Service Providers (Consulting Engineers and Contractors) for the Planning, Design and Construction of WSIG-funded Projects in the Alfred Nzo District Municipality ('the tender'), is declared unlawful;



- (b) the first respondent's decision to disqualify the bid submitted by the applicant in response to the tender is hereby reviewed, declared unlawful, and set aside;
- (c) the second respondent's decision to award the tender to the third, fourth, fifth and sixth respondents and to appoint them to the panel of service providers in accordance with the tender is hereby reviewed, declared unlawful, and set aside;
- (d) any contract entered into by the first respondent and the third, fourth, fifth and sixth respondents pursuant to the award of the tender is declared unlawful and void *ab initio*, and set aside;
- (e) the declarations and effect thereof, in terms of paragraphs (a), (b), (c) and (d), above, are suspended for a period of 30 days; and
- (f) the respondents are directed to pay the applicant's costs, jointly and severally, in the event of one paying then the others are absolved, provided that:
  - (i) with regard to the first and second respondents, their liability shall be limited to 90% of such costs; and
  - (ii) with regard to the third, fourth, fifth and sixth respondents, their liability shall be limited to 70% of such costs.

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**JGA LAING**

**JUDGE OF THE HIGH COURT**

## APPEARANCE

Counsel for the applicant:	Adv Nyangiwe, instructed by Moletsane PN Attorneys Inc, East London.
Counsel for the 1 <sup>st</sup> and 2 <sup>nd</sup> respondents:	Adv Bodlani, instructed by Funani Attorneys, Mthatha.
Counsel for the 3 <sup>rd</sup> to 6 <sup>th</sup> respondents:	Adv Ntlokwana, instructed by Kulu Z Attorneys c/o Gilindoda Attorneys, Makhanda.
Date of hearing:	03 February 2022
Date of final submissions, as directed:	17 May 2022
Date of delivery of judgment:	14 June 2022